Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

JEROME J. RUDDELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BEST AVAILABLE COPY

15 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that 18 U.S.C. 2252 (1988 & Supp. IV 1992), which proscribes the transportation, shipment, receipt, and distribution of child pornography, is unconstitutional on its face on the ground that it does not require the government to prove that the defendant knew that the materials at issue depicted minors engaging in sexually explicit acts.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JEROME J. RUDDELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unpublished, but the judgment is noted at 2 F.3d 1159 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1993. The court of appeals denied a timely petition for rehearing on June 29, 1994. App., *infra*, 3a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions—18 U.S.C. 2251, 2252 (1988 & Supp. IV 1992), and 2256—are reprinted at App., *infra*, 4a-8a.

STATEMENT

1. In March 1991, James Bruni, a distributor of adult, sexually explicit material, purchased a mailing list containing the name and address of respondent Jerome J. Ruddell. After Bruni sent respondent a packet of sexually explicit adult material, Ruddell expressed interest in obtaining videotapes depicting minors engaged in sexually explicit conduct. Bruni gave respondent's letter to federal postal authorities. Posing as a distributor of child pornography, a postal inspector contacted respondent, requesting more specific information about respondent's preferences, including the age and gender of the children. Respondent subsequently ordered a videotape entitled "Little Ones in Love," which depicts a minor female engaged in sexually explicit conduct. A controlled delivery of the videotape was made to respondent's house by express mail courier. Approximately 15 minutes later, a search warrant was executed and the videotape (along with other items) was seized. Plea Mem. 5-6.

2. Respondent was indicted on one count of receiving materials involving the sexual exploitation of minors, in violation of 18 U.S.C. 2252(a)(2) (1988 & Supp. IV 1992). He moved to suppress the items seized. The district court granted the motion as to some items but denied it as to the videotape. Order 1-2 (Apr. 22, 1992).[1] Respondent entered a conditional guilty plea, reserving his right to appeal the

[1] The district court's order does not address the question presented by this petition.

suppression ruling. Plea Mem. 3. Respondent was sentenced to 12 months and one day in prison, to be followed by three years' supervised release. Gov't C.A. Br. 4.

3. While respondent's appeal was pending, the Ninth Circuit issued its opinion in *United States* v. *X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992), cert. granted, No. 93-723 (Feb. 28, 1994) (to be argued Oct. 5, 1994). In *X-Citement Video*, the court of appeals held that 18 U.S.C. 2252 is facially unconstitutional because it does not require knowledge of the minority of the performers as an element of the crime. See 982 F.2d at 1289-1292. The court of appeals in the instant case requested supplemental briefing on the scienter issue, which had not been raised in the district court. The court subsequently reversed respondent's conviction on the authority of *X-Citement Video*. App., *infra*, 1a-2a.

REASONS FOR GRANTING THE PETITION

The decision in this case relies entirely on the Ninth Circuit's earlier decision in *X-Citement Video*. The government's petition for a writ of certiorari in *X-Citement Video* has been granted (see No. 93-723), and the case is scheduled for oral argument on October 5, 1994. If the Court reverses the judgment of the Ninth Circuit in that case, reversal would be appropriate in the instant case as well. Accordingly, the Court should hold the petition in this case pending disposition of *X-Citement Video*.[2]

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[2] We have provided counsel for respondent with a copy of our briefs in *X-Citement Video*.

CONCLUSION

The petition for a writ of certiorari should be held pending disposition of *United States* v. *X-Citement Video, Inc.*, No. 93-723, and disposed of as appropriate in light of the Court's disposition of that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

SEPTEMBER 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-10451
D.C. No. CR-91-00307-LDG

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JEROME RUDDELL, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

[Filed Aug. 5, 1993]

MEMORANDUM*

Submitted July 21, 1993**

Before: BROWNING, TANG and NORRIS, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, we deny Ruddell's request for oral argument.

Jerome Ruddell appeals his conviction, following a conditional guilty plea, for receiving child pornography in violation of 18 U.S.C. § 2252(a)(2). Ruddell contends, among other things, that section 2252 is facially unconstitutional in light of our decision in *United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992).[1] We review de novo, *see United States v. Martinez*, 967 F.2d 1343, 1348 (9th Cir. 1992), and reverse.

We recently held that section 2252 is facially unconstitutional because it does not require knowledge of the minority of the performers as an element of the crime. *See X-Citement Video*, 982 F.2d at 1292-93. The government urges this panel to reconsider *X-Citement Video*. We decline this suggestion, however, because " 'a panel not sitting en banc has no authority to overturn Ninth Circuit precedent.' " *United States v. Lucas*, 963 F.2d 243, 247 (9th Cir. 1992) (*quoting United States v. Aguilar*, 883 F.2d 662, 690 n.25 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 751 (1991)). Therefore, Ruddell's conviction must be reversed. *See id.*[2]

REVERSED.

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[1] Although Ruddell failed to present this argument to the district court, a jurisdictional challenge may be raised at any point during the proceedings. *Rosenfeld v. United States*, 859 F.2d 717, 723 (9th Cir. 1988).

[2] In light of our holding, we do not reach Ruddell's remaining arguments.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-10451
D.C. No. CR-91-00307-LDG
Nevada (Las Vegas)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JEROME RUDDELL, DEFENDANT-APPELLANT

[Filed June 29, 1994]

ORDER

Before: BROWNING, TANG, and NORRIS, Circuit Judges.

The petition for rehearing is denied.

APPENDIX C

At the time of the acts alleged in the indictment, Chapter 10 of Title 18, U.S.C., provided in pertinent part, as follows:

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (d) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (d).

(2) The circumstance referred to in paragraph (1) is that–

(A) such person knows or has reason to know that such notice or advertisement will be transported in interstate or foreign commerce or by any means including by computer or mailed; or

(B) such notice or advertisement is transported in interstate or foreign commerce by any means including by computer or mailed.

(d) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

* * * * *

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who–

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if–

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either –

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materails[1] which have been mailed or shipped or transported, by any means, including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

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[1] So in original. Probably should be "materials".

(ii) such visual depiction is of such conduct; or

(4) either –

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b)(1) Whoever violates paragraph (1), (2), or (3) of subsection (a) shall be fined under this title or imprisoned not more than ten years, or both, but, if such person has a prior conviction under this section, such person shall be fined under this title and imprisoned for not less than five years nor more than fifteen years.

(2) Whoever violates paragraph (4) of subsection (a) shall be fined under this title or imprisoned for not more than five years, or both.

§ 2256. Definitions for chapter

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape;

(6) "computer" has the meaning given that term in section 1030 of this title; and

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained.

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No. 94-564

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

UNITED STATES OF AMERICA, Petitioner

v.

JEROME J. RUDDELL

Respondent's Memorandum in Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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5 pp

RESPONDENT JEROME RUDDELL RESPECTFULLY SUBMITS THIS MEMORANDUM IN RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI.[1]

STATEMENT

This respondent was indicted on one count of Receiving Materials Involving Sexual Exploitation of Minors in Violation of 18 United States Code 2252(a)(2) (1988 & Supp. IV 1992). He subsequently entered a conditional plea to the indictment, preserving the right to appeal the lower court's denial of a motion to suppress the videotape that was the subject of the prosecution. Plea memo. 3 The respondent was sentenced to 12 months and one day in prison, and three years supervised release. Gov't C.A. Br. 4.

While the appeal on the suppression issue was pending, and after opening and reply briefs were filed, the Ninth Circuit Court of Appeals decided United States v. X-Citement Video, Inc, 982 F.2d 1285 (9th Cir. 1992). In that opinion, the Ninth Circuit Court of Appeals declared 18 U.S.C. 2252 facially unconstitutional because the statute did not require knowledge of the minority of the performers as an element of the crime. See X-Citement Video Inc. 982 F.2d at 1289-1292. Respondent moved for and was granted leave to file a supplemental opening brief on this issue because of the

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[1] In a letter from the Clerk of the Supreme Court, dated November 21, 1994, Respondent was requested to file a response to the Petition for Writ of Certiorari by December 21, 1994. Subsequent to that letter, on November 29, 1994, the Supreme Court rendered its decision in United States v. X-Citement Video, Inc. 115 St. Ct. 464 (1994). That decision was dispositive of the issue raised in the Petition for Writ of Certiorari in this case. This Memorandum is filed in lieu of a Brief in Opposition to the Petition for Writ of Certiorari at the direction of the Clerk of the Supreme Court.

X-Citement decision.[2] In an unpublished decision, the court reversed the respondents's conviction, relying on their ruling in X-Citement, that the statute was facially unconstitutional.[3] In light of the reversal, the Court of Appeals did not reach or rule on the other issues raised in the appeal.

The United States petitioned for Writ of Certiorari in X-Citement Video, challenging the Court of Appeals determination that the statute was unconstitutional. The Petition in X-Citement Video was granted on February 28, 1994. The United States petitioned for Writ of Certiorari to the Supreme Court in the instant case, on September 27, 1994, after its petition for rehearing was denied by the Court of Appeals. On November 29, 1994, the Supreme Court reversed the decision of the Ninth Circuit Court of Appeals in X-Citement Video. The Court held that the statute was constitutional because knowledge of the minority of the performers is a scienter element included within the statute.

CONCLUSION

The Supreme Court's decision in United States v. X-Citement Video 115 S. Ct. 464 (1994), is dispositive of the question presented in the Petition for Writ of Certiorari in the instant case. Accordingly, the United States' Petition For Writ of Certiorari should be granted and the judgment of the Ninth Circuit Court of Appeals should be vacated. This case should be remanded for further consideration of the appellate issues which were not addressed or decided by the Court of Appeals and which were not the

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[2] This issue was not raised in the district court. The Ninth Circuit granted respondent leave to raise it on appeal, because it was a jurisdictional challenge.

[3] The judgment is noted at 2 F.2d 1159 (table).

subject of the Petition to the Supreme Court in this case.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, Petitioner	)	
	)	
	)	NO.
v.	)	
	)	
	)	
JEROME J. RUDDELL	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served three copies of the **RESPONDENT'S MEMORANDUM IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT** and one copy of **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**, by first-class mail, postage prepaid, this 15th day of December, 1994.

THOMAS C. BRADLEY
ASSISTANT FEDERAL PUBLIC DEFENDER
300 BOOTH STREET
ROOM 2151
RENO, NEVADA 89509

Drew S. Days, III
Solicitor General
Department of Justice
Washington, D.C. 20530

Dated this 15 day of December, 1994.

T C Bradley

THOMAS C. BRADLEY